A **HASS PLANTATION SDN BHD**

v.

SOUTHWIND DEVELOPMENT SDN BHD

B COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SYED AHMAD HELMY JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NO: Q-02-250-2010]
C 20 OCTOBER 2010

CONTRACT: *Employment contract - Termination - Defendant appointed plaintiff to develop land into an oil palm plantation - Subsequent termination of contract by defendant - Whether plaintiff had breached* D *conditions of contract - Whether defendant's termination of contract wrong and clearly a breach - Assessment of damages*

This was an appeal by the defendant against the High Court judge's decision finding the defendant liable for breach of contract and awarding damages amounting to RM12,611,758.70 to the plaintiff. E The defendant had, pursuant to an undated agreement ('Oil Palm Contract') incorporating, *inter alia*, a list of Conditions, appointed the plaintiff to develop a parcel of land into an oil palm plantation. Subsequently, the defendant purportedly terminated the Oil Palm Contract, alleging that: (i) the plaintiff was in breach of Condition F 12 by sub-contracting to others without the defendant's written consent; (ii) the plaintiff was in breach of Condition 24(a)(i) when it suspended the works before completion without reasonable cause; and (iii) the plaintiff was in breach of Condition 24(a)(ii) when it failed to proceed with the works with reasonable diligence. G

Held (dismissing the appeal with costs)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) The defendant's complaint that the plaintiff had breached H Condition 12 by sub-contracting the works described in the Oil Palm Contract without the defendant's consent was defeated by Condition 12, read conjunctively with the defendant's solicitors' letter dated 29 March 1995 stating clearly that the defendant was not the estate owner. The question of obtaining the I defendant's consent was manifestly misconceived as Condition 12 did not provide for such consent. The consent required was

that of the estate owner, Seatex Development Sdn Bhd which, however, was not a party in the High Court or in the instant appeal. Hence, this issue was wholly unmeritorious. (paras 6 & 7)

(2) Issues (ii) and (iii) could be considered together as they revolved around the construction of Condition 24(a)(i) and (ii). Pursuant to Condition 24, the defendant issued a notice to the plaintiff. As in Condition 12, Condition 24 expressly stipulated that the notice should be sent by the estate owner. Thus, the notice could not be valid since the defendant had maintained through its solicitors that the estate owner was not the defendant but Seatex Development Sdn Bhd. In the circumstances, the termination of the Oil Palm Contract by the defendant when it was not the estate owner was plainly wrong. That being the case, the defendant was clearly in breach of the Oil Palm Contract, for which it was liable to the plaintiff for damages flowing therefrom. (paras 8-10)

(3) The trial judge had accepted the entire evidence adduced for the plaintiff, in particular the computation arrived at by PW3 in relation to the profit of RM12,611,758.70, which was awarded to the plaintiff. The trial judge's award of damages was primarily based on his findings of fact premised on the evidence adduced at the trial. In the light of two conflicting versions, he had accepted the evidence for the plaintiff and rejected the defendant's evidence. As a trier of facts he was entitled to do so, and there was no reason to disturb his findings of fact. There was also no appealable error in the assessment of damages awarded by him. Therefore, appellate interference was not justified. *Amar Singh v. Chin Kiew* (foll); *Bank Utama (Malaysia) Bhd v. Insan Budi Sdn Bhd* (foll). (paras 17-18)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh defendan terhadap keputusan hakim Mahkamah Tinggi memutuskan bahawa defendan bertanggungjawab melanggar kontrak dan mengawardkan gantirugi dalam jumlah RM12,611,758.70 kepada plaintif. Defendan telah, mengikut suatu perjanjian tidak bertarikh ('Kontrak Kelapa Sawit') yang menggabungkan, antara lain, satu senarai Syarat-Syarat, melantik plaintif untuk memajukan sebidang tanah menjadi sebuah ladang

kelapa sawit. Kemudiannya, defendan dikatakan menamatkan Kontrak Kelapa Sawit, dengan mengatakan bahawa: (i) plaintif telah melanggar Syarat 12 dengan memberikan sub-kontrak kepada orang lain tanpa keizinan bertulis defendan; (ii) plaintif telah melanggar Syarat 24(a)(i) apabila ia menggantungkan kerja-kerja sebelum menyudahkannya tanpa sebab munasabah; dan (iii) plaintif telah melanggar Syarat 24(a)(ii) apabila ia gagal untuk meneruskan dengan kerja-kerja dengan ketekunan munasabah.

Diputuskan (menolak rayuan dengan kos)

Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Aduan defendan bahawa plaintif telah melanggar Syarat 12 dengan memberi sub-kontrak kerja-kerja yang diterangkan dalam Kontrak Kelapa Sawit tanpa keizinan defendan telah dikalahkan oleh Syarat 12, dibaca bersama-sama dengan surat peguamcara defendan bertarikh 29 Mac 1995 yang menyatakan dengan jelas bahawa defendan bukan pemilik estet. Persoalan memperolehi keizinan defendan dengan jelasnya salah tanggap kerana Syarat 12 tidak menyediakan untuk keizinan sebegitu. Keizinan yang diperlukan adalah keizinan pemilik estet, Seatex Development Sdn Bhd yang, walau bagaimanapun, bukan pihak dalam Mahkamah Tinggi atau di dalam rayuan semasa. Oleh itu, isu ini tidak mempunyai merit langsung.

(2) Isu-isu (ii) dan (iii) boleh ditimbangkan bersama kerana mereka berkisar pada pentafsiran Syarat 24(a)(i) dan (ii). Mengikut Syarat 24, defendan mengeluarkan satu notis terhadap plaintif. Seperti dalam Syarat 12, Syarat 24 menyatakan dengan jelas bahawa notis sepatutnya dihantar oleh pemilik estet. Oleh itu, notis tersebut adalah tidak sah kerana defendan telah menegaskan melalui peguamcaranya bahawa pemilik estet bukannya defendan tetapi Seatex Development Sdn Bhd. Dalam keadaan, penamatan Kontrak Kelapa Sawit oleh defendan apabila ia bukan pemilik estet adalah jelasnya salah. Oleh yang demikian, defendan nyata telah melanggar Kontrak Kelapa Sawit, untuk mana ia bertanggungjawab kepada plaintif bagi gantirugi yang akibat darinya.

(3) Hakim perbicaraan telah menerima keseluruhan keterangan yang dikemukakan bagi plaintif, terutamanya pengiraan yang dibuat oleh PW3 berhubungan dengan keuntungan RM12,611,758.70,

yang telah diawardkan kepada plaintif. Award gantirugi hakim perbicaraan adalah berasaskan terutamanya atas keputusan fakta yang berdasarkan keterangan yang dikemukakan di perbicaraan. Memandangkan dua versi bertentangan, beliau telah menerima keterangan bagi plaintif dan menolak keterangan defendan. Sebagai penimbang fakta-fakta beliau berhak berbuat demikian, dan tiada sebab untuk mengusik keputusan fakta beliau. Juga tidak ada apa-apa kesilapan yang boleh dirayu terhadap dalam taksiran gantirugi yang diawardkan oleh beliau. Oleh itu, campurtangan rayuan tidak diwajarkan. *Amar Singh v. Chin Kiew* (diikuti); *Bank Utama (Malaysia) Bhd v. Insan Budi Sdn Bhd* (diikuti).

Case(s) referred to:
Amar Singh v. Chin Kiew [1960] 1 LNS 5 HC ***(foll)***
Bank Utama (Malaysia) Bhd v. Insan Budi Sdn Bhd [2009] 1 CLJ 221 CA ***(foll)***

For the appellant - Tan Thiam Teck (KY Lim & Joyce Chan with him); M/s Kadir, Wong, Lin & Co
For the respondent - Mohamad Ivan Hussein; M/s Ivan Hussein Advocates

[Appeal from High Court, Miri; Civil Suit No: 22-32-2007 (MR)]

[Editor's note: For the High Court judgment, please see Southwind Development Sdn Bhd v. Hass Plantation Sdn Bhd [2009] 1 LNS 1737.]

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] This appeal was brought by the appellant ("the defendant") against the decision of the Miri High Court handed down on 9 December 2009 after a full trial. The High Court found the defendant liable for breach of contract, granted judgment in favour of the respondent ("the plaintiff") and awarded damages in the sum of RM12,611,758.70 with interest at 8% per annum from 27 June 1995 to the date of realisation and costs.

A

Factual Background

[2] On or about 20 April 1994, the plaintiff as contractor and the defendant as employer executed an undated agreement ("the Oil Palm Contract") which incorporated, *inter alia*, a list of conditions. (A reference hereinafter to a condition is a reference to that Condition in the Oil Palm Contract). The defendant appointed the plaintiff to develop all that parcel of land containing an approximate area of 4,856 hectares, described as Lot 62 in Sawai Land District ("Lot 62") into an oil palm plantation.

[3] *Vide* letter dated 28 December 1994, the defendant complained that the plaintiff had failed to rectify all the defective works or failed to proceed with the works with reasonable diligence after 14 days notice had been given earlier. The defendant purportedly terminated the Oil Palm Contract, alleging that:

(1) The plaintiff was in breach of Condition 12 by sub-contracting to others without the defendant's written consent;

(2) The plaintiff was in breach of Condition 24(a)(i) when it suspended the works before completion without reasonable cause; and

(3) The plaintiff was in breach of Condition 24(a)(ii) when it failed to proceed with the works with reasonable diligence.

Sub-contracting Without Consent

[4] Condition 12 where relevant provides for sub-contracting as follows:

> **12. Sub-contracting**
>
> The Contractor shall not without **the written consent of the Estate Owner** first obtained assign this Contract or Sub-Contract, all or any portion of the Works; provided that such consent shall not be unreasonably withheld to the prejudice of the Contractor. (emphasis added)

[5] It is significant for us to note that Condition 12 expressly refers to "the written consent of the Estate Owner". The expression "Estate Owner" is not defined in the Oil Palm Contract. The Oil Palm Contract specifically refers to the defendant as "the employer". Contemporaneous document in the form of the letter of

defendant's solicitors M/s Kadir, Wong, Lin & Co. dated 29 March 1995 in the appeal record Part C p. 164 states that "... our client is not the registered owner. The estate owner is Seatex Development Sdn Bhd as appeared on the map annexed to the undated agreement." A

B

[6] The defendant's complaint that the plaintiff had breached Condition 12 by sub-contracting the works described in the Oil Palm Contract without the defendant's consent is defeated by Condition 12, read conjunctively with the said letter of the defendant's solicitors, stating clearly that the defendant was not the estate owner. The question of obtaining the defendant's consent raised for the defendant is manifestly misconceived as Condition 12 does not provide for the defendant's consent. The consent required is that of the Estate Owner ie, Seatex Development Sdn Bhd. However, Seatex Development Sdn Bhd is not a party in the High Court or in the instant appeal. C D

[7] We have no difficulty in holding that this issue raised for the defendant is wholly unmeritorious.

Condition 24(a) E

[8] The defendant's contention that the plaintiff had suspended the works without reasonable cause and that the plaintiff had failed to proceed with the works with reasonable diligence may be considered together. These two issues revolve around the construction of Condition 24(a)(i) and (ii), the relevant portion of which is reproduced below: F

> **24. Determination of Contract by the Estate Owner**
>
> (a) Default: if the Contractor shall make default in any of the following respects, namely: G
>
> (i) without reasonable cause wholly suspends the works before completion;
>
> (ii) fails to proceed with the works with reasonable diligence. (emphasis added) H

[9] Pursuant to Condition 24, the defendant issued a notice to the plaintiff. We are of the view that, as in Condition 12, Condition 24 expressly stipulated that the notice should be sent by the Estate Owner. The notice which the defendant issued under Condition 24 I

A cannot be valid, because the defendant had maintained through the defendant's solicitors that the Estate Owner was not the defendant but Seatex Development Sdn Bhd.

[10] In the circumstances, we hold that the termination of the Oil
B Palm Contract by the defendant when the defendant is not the Estate Owner is plainly wrongful. That being the case, the defendant was clearly in breach of Oil Palm Contract, for which the defendant is liable to the plaintiff for damages flowing therefrom.

C **Assessment Of Damages**

[11] On the issue relating to the quantum of damages to be awarded, the plaintiff adduced evidence showing in detail the computation of the profit which the plaintiff would have made had there been no wrongful termination of the Oil Palm Contract by the
D defendant.

[12] PW1 testified for the plaintiff that the rates in the Oil Palm Contract were higher than FELDA's rates. When asked by the defendant's counsel whether PW1 had FELDA's rates with him,
E PW1 answered in the affirmative. However, the defendant's learned counsel did not proceed to ask PW1 to produce FELDA's rates for verification or comparison.

[13] Next, PW3 testified for the plaintiff that a profit of
F RM10,796,181.50 could be made pursuant to the Oil Palm Contract, and another profit of RM2,000,000 could be made on Variation Orders. He added that the defendant had paid RM184,422.80 only. Therefore, the total nett profit is RM10,796,181.50 + 2,000,000 - 184,422.80 = RM12,611,758.70.

G **[14]** On the other hand, the defendant's evidence adduced through DW2 revealed that the rates offered to his company were too low to be able to make any profit.

[15] DW3 who testified for the defendant admitted that he was
H giving evidence merely to help the defendant. Be that as it may, his evidence had actually supported the plaintiff's evidence that the performance of the Oil Palm Contract would have resulted in profit to the plaintiff, as demonstrated below:

I

(1) The agreement for comparison purposes was for a contract area of 736 hectares, for which the contract sum was RM2,726,669.70.

(2) Therefore, for an area of 4,856 ha, the contract sum, using DW3's rates with Golden Hope, would be:

$$\frac{4,856}{736} \times \text{RM2,726,669.70} = \text{RM17,990,092.50}$$

(3) However, from the defendant's own computation, the contract value of the Oil Palm Contract was RM26,960,453.72, based on the entire area of Lot 62 being planted.

(4) Therefore, the difference in contract prices of RM26,960,453.72 - RM17,990,092.50 would fetch a profit of RM9,080,361.22 which is nearer to the plaintiff's computation of RM10,796.181.50.

[16] Testifying for the defendant, DW4's witness statement was to the effect that the plaintiff would incur losses of RM3,787,369.22. However, under cross-examination, DW4 testified that Woodshine Sdn Bhd (of which he was a director) had carried out plantation development works on Lot 62 and had made a profit therefrom but with a "higher contract rate". A comparison of rates between the plaintiff and Woodshine Sdn Bhd further demonstrates that the rates given to Woodshine Sdn Bhd are similar.

[17] The learned trial judge had accepted the entire evidence adduced for the plaintiff, in particular the computation arrived at by PW3 in relation to the profit of RM12,611,758.70, which was awarded to the plaintiff.

[18] The award of damages by the learned trial judge is primarily based on his finding of facts based on the evidence adduced at the trial. In the light of two conflicting versions, he has accepted the evidence adduced for the plaintiff company and rejected the defendant's evidence. As a trier of facts, the learned trial judge is entitled to do so. There is no reason for us to disturb his finding of facts. We also see no appealable error in the assessment of damages awarded by him. Hence it does not justify any appellate interference.

[19] In *Amar Singh v. Chin Kiew* [1960] 1 LNS 5, Thomson CJ stated succinctly as follows:

> The fixation of damage is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. It is, to some extent, an exercise of judicial discretion. The Court of Appeal will not therefore give preference to their own figure simply because they disagree with the figure arrived at by the trial judge; they will only interfere if they are satisfied that the judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons made a wholly erroneous estimate of the damage suffered.

[20] A similar sentiment was shown by this court in *Bank Utama (Malaysia) Bhd v. Insan Budi Sdn Bhd* [2009] 1 CLJ 221, in the following passage:

> [88] It is trite that an appellate court will not ordinarily interfere with the findings and award of the trial court unless the following are shown: (i) that the award or findings were clearly wrong or erroneous; taking into account irrelevant matters and not considering relevant matters; (ii) that the findings were clearly wrong in law and principle. (per Hasan Lah JCA)

Conclusion

[21] On the foregoing grounds, we find no merit in this appeal which we hereby dismiss with the agreed costs of RM100,000. The aforesaid decision of the High Court is affirmed. Deposit to the plaintiff (respondent) on account of the agreed costs.